



Supreme Court of the United States

OCTOBER TERM 1944

SAMUEL GREENBERG,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

The unlawful search and seizure of the books and records and the use of them against petitioner before the Grand Jury and upon the trial was a violation of the due process clause of the Fourteenth Amendment.

(A)

Petitioner contends that the seizure from him of the books and records in the manner hereinafter referred to and the search thereof was illegal and the use thereof before the Grand Jury and upon the trial was, in violation of the Fourth and Fifth Amendments to the Federal Constitution, respectively. We contend that such seizure and search and use was also in violation of Article 1, Section 12 of the Constitution of the State of New York, prohibiting unlawful search and seizure and hence, such use of the books and records was in violation of Article 1, Section 6 of the Constitution of the State of New York and of the Fourteenth Amendment.

While it is true that the Fourth and Fifth Amendments operate only against the Federal Government, we contend that since the search and seizure and use of the books and records was also a violation of the corresponding provisions of the New York State Constitution above referred to, there was, under such circumstances also a denial of due process under the Fourteenth Amendment.

Malinski v. People, 89 Lawyers Ed. 738 at page 748;

Betts v. Brady, 316 U. S. 455, 460, 461.

In *Malinski v. People, supra*, this Court said at page 748:

"The Due Process Clause of the Fourteenth Amendment has thus potency different from and independent of the specific provisions contained in the Bill of Rights."

In *Betts v. Brady, supra*, this Court said that, although the first eight amendments to the Constitution are directed against the Federal government, yet a denial by a State of the rights or privileges specifically embodied in said first eight amendments "may, in certain circumstances, or in connection with other elements, operate in a given case, to deprive a litigant of due process of law in violation of the Fourteenth".

We contend that such circumstances are furnished by the existence of the similar provisions in Article 1, Section 12, and Article 1, Section 6 of the State Constitution, to those in the Fourth and Fifth Amendments to the Federal Constitution.

The books and records were obtained by the District Attorney in the following manner:

On August 30th, 1943 there was pending before the Grand Jury of the County of New York a proceeding prosecuted by the People of the State of New York

against "John Doe" (See subpoena *duces tecum* dated August 30th, 1943 after R., p. 46).

On said August 30th, 1943 at about 11 A. M. five men, two of them detectives and three of them accountants from the District Attorney's office, appeared at the office of Samuel Greenberg Clothes, at No. 130 Fifth Avenue, Borough of Manhattan, New York City. This was a partnership of which petitioner was the senior member (R., pp. 21 and 54). There had been a corporation, Samuel Greenberg Clothes Inc. which had ceased doing business in October 1942 (R., pp. 54 and 61).

The detectives identified themselves by displaying official badges (R., p. 54). One of these men from the District Attorney's office produced and served upon the petitioner (R., pp. 23 and 24) the subpoena *duces tecum* set forth as "D" after R., p. 46).

This subpoena, addressed to Samuel Greenberg Clothes Inc., the corporation, directed said Samuel Greenberg Clothes Inc. to appear "forthwith" before the Grand Jury, in said proceeding prosecuted by the People of the State of New York against "Joe Doe" and to produce before it all of the books and records set forth in said subpoena.

This subpoena stated that for a failure to attend "you will be deemed guilty of a criminal contempt of court and liable to a fine of Two Hundred and Fifty Dollars and imprisonment for thirty days and to be prosecuted and punished for a misdemeanor."

The men from the District Attorney's Office threatened petitioner, by stating that if the books were not surrendered immediately, they would get the books together themselves and take them to the District Attorney's office and there was nothing that could stop them (R., pp. 22, 33, 34 and 41).

They told petitioner that he had no choice, but to comply with their demands (R., p. 56).

In the meantime, some of these men rummaged through the safes, desk drawers and files, opening books and examining records and making notes from them, including the partnership and personal records of petitioner (R., pp. 23 and 61).

Petitioner was afraid that, in view of the language of the subpoena, he would be prosecuted criminally, if he did not surrender the books (R., p. 57). At 2 P. M. these men left the premises of the partnership, taking with them all of the books and records set forth in the subpoena (R., p. 23).

Not one of the five persons, who in this manner obtained these books and records made any affidavit in opposition to the motion to obtain a return of them (R., p. 61).

The next day at the District Attorney's office the chief accountant said to petitioner, in the presence of petitioner's brother: "You know that we have your books here—we haven't looked into them as yet. You know as well as I do that if we examine those books and go through them carefully, if necessary with a fine tooth comb, we will find plenty on you and then you will suffer and have to be penalized. If you will tell us what we want to know about the Aurelio case we will return the books to you without even looking at them" (R., p. 24). Petitioner insisted that he knew nothing about the Aurelio matter and he and his brother then left (R., p. 24). The Aurelio matter was an investigation by the District Attorney into the nomination of one Aurelio for Justice of the Supreme Court of the State of New York (R., p. 26).

It thus appears abundantly that the subpoena duces tecum was a subterfuge and sham and was used for the

purpose of a raid by five men upon the office of petitioner's partnership. The use of the books and records seized in such raid under threat of punishment of petitioner, if he did not surrender them and the promise of the District Attorney to return them, if petitioner furnished evidence to the District Attorney in a matter being investigated by him, constituted such coercion and duress as to render such subpoena null and void *ab initio* and to make the search and seizure illegal.

Consequently, the District Attorney should have been barred from using any of said books and records before the Grand Jury or at the trial.

The receipt by the District Attorney for the books and records seized from the partnership office is opposite R., p. 42, marked Exhibit A. The receipt by the District Attorney for the cancelled checks and bank statements seized is opposite R., p. 45, marked Exhibit B.

The indictment covers petitioner's income for the years 1941 and 1942. The books and ledgers taken from the partnership cover the years 1941 and 1942 and prior years and the checks and bank statements cover the years 1940, 1941, 1942 and up to and including July, 1943 (see said Exhibits A and B).

These books, checks and bank statements were used to obtain the indictment against the petitioner (R., pp. 28 and 42) and were offered in evidence against the petitioner at pp. 113-171, inclusive, of the Record. The petitioner objected to the admission in evidence of such documents, on the ground that such testimony could not be used against the petitioner, because it was compulsory testimony (R., pp. 113 and 115).

The same objection was made to the introduction of all of said exhibits, when they were offered.

It is obvious that, without the admission in evidence of such books, checks and bank statements a conviction could not have been had.

The petitioner having moved seasonably for the return of these documents, there can be no question that, if this prosecution had been in a Federal Court, it would have been reversible error to allow the introduction thereof in evidence, in violation of the Fourth and Fifth Amendments.

Weeks v. U. S., 232 U. S. 383;
Silverthorne Lumber Co. v. U. S., 251 U. S. 385;
Gouled v. U. S., 255 U. S. 298;
Go-Bart v. U. S., 282 U. S. 344;
Takahashi v. U. S., 143 F. (2d) 118 (CCA 9th).

We have seen that there was a violation of the Fourth and Fifth Amendments to the Constitution in the unlawful search and seizure of the documents and the use thereof against the petitioner.

There was also a violation of Article 1, Section 12 of the New York State Constitution against unlawful search and seizure which is identical in language with the Fourth Amendment.

Such language is:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated."

This provision was added to the Constitution of the State of New York in 1938 by the Constitutional Convention of the State of New York.

Because prior to that time there was no provision in the New York State Constitution against unlawful search and seizure, it had been held that, notwithstanding the language of Article 1, Section 6 of said Constit-

tution, which provided that "no person shall be compelled in any criminal case to be a witness against himself", evidence obtained by unlawful search and seizure, was nevertheless admissible in evidence.

People v. Defore, 242 N. Y. 13.

However, even after such amendment, the Court of Appeals of New York held that evidence obtained by unlawful search and seizure could be used in evidence against a defendant, because in such amendment there was no specific language prohibiting such use.

People v. Richter's Jewelers, Inc., 291 N. Y. 161.

Such interpretation runs counter to the construction placed by this Court on the Fourth Amendment, because that amendment, like Article 1, Section 12 of the New York State Constitution, does not contain any language prohibiting the use of evidence obtained by an unlawful search and seizure and yet such use has uniformly been held by this Court to be in violation of the Fifth Amendment, containing the same language as Article 1, Section 6 of the New York State Constitution.

Go-Bart v. U. S., 282 U. S. 344, 357.

This Court said through Justice Holmes in *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385 at p. 392:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."

We think the decision of the Court of Appeals is therefore in conflict with applicable decisions of this Court.

(B)

The respondent argued in the courts below, that, since the subpoena was directed to Samuel Greenberg Clothes, Inc., and not to the petitioner personally, he cannot claim that, by the use of these corporate books and records before the Grand Jury and at the trial, he was compelled to give incriminating evidence against himself.

We have shown that these books and records were unlawfully seized.

It has been held by this Court that where books of a corporation have been illegally seized, they cannot be used either against the corporation or its officers.

Silverthorne Lumber Co. v. U. S., 251 U. S. 385, *supra*.

Petitioner had been the President of Samuel Greenberg Clothes, Inc., against which the subpoena was directed, but was no longer such at the time it was issued, as the corporation had ceased doing business in October 1942. At the time the said subpoena duces tecum was served, he was the senior member of the partnership of Samuel Greenberg Clothes Co. (R., pp. 54 and 61).

Furthermore, the District Attorney took an inconsistent position on this matter at the trial. In his opening to the jury he stated that the corporation was the usual close family corporation, of which the petitioner was the president and principal stockholder and that it was under his personal control and supervision (R., p. 93). Yet, in the next breath, the District Attorney tried to use the corporate entity as a reason why the petitioner could not claim a violation of his constitutional rights in the use of the seized corporate books and records against him.

The District Attorney cannot thus blow hot and cold. When he obtained a conviction of the petitioner on the theory that the corporation was only the creature of the petitioner, he should not be heard to say that the corporation's books were not the petitioner's books.

The fiction of a corporate entity will not be allowed to justify a wrong, such as the denial of a constitutional right of the defendant.

Smith v. Moore, 199 F. 689, 699, 700 (CCA 9th);
U. S. v. Lehigh Valley R. R. Co., 220 U. S. 257,
273.

Furthermore, all of the checks of the business for the entire year 1942 were subpoenaed and obtained and a receipt given therefor (R., Exhibit B opposite R., p. 44).

It is not disputed that the business was conducted as a partnership after October 1st, 1942 (R., p. 54), so that some of the checks taken by the District Attorney were those of the partnership, of which petitioner was the senior partner.

One of the checks which was used against the defendant was a check dated December 3rd, 1942, for \$24,591.54 drawn to Metcalf Bros. at a time when the business was conducted as a partnership (R., pp. 37-39, inclusive). By virtue of this check and other checks obtained by the District Attorney which were not drawn by the corporation, the District Attorney obtained clues and links in the chain of testimony against the petitioner (R., pp. 38 and 39).

In any event, therefore, the use of the records of the partnership, of which petitioner was the senior member, was illegal and vitiates all the testimony adduced as a consequence of such illegal use. Every doubt of the effect of such illegal use should be resolved in favor of the petitioner.

This Court in

Counselman v. Hitchcock, 142 U. S. 547;
said at p. 566:

"Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule, that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself; and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction."

It is respectfully submitted that this Court should grant the writ of certiorari, because defendant was denied due process by being compelled, by the unlawful search and seizure, to incriminate himself.

POINT II

There was a failure of due process because the State Tax Commission had not found and certified that petitioner owed any tax.

The State Tax Commission was created by the Legislature, and consists of three commissioners appointed by the Governor (Tax Law, Sec. 170). It is given power to make rules and regulations, to assess, determine, review, re-adjust and collect taxes upon and with respect to personal income, to take testimony and proofs under oath, to compromise in certain cases taxes and the penalties and interest in connection therewith (Tax Law, Sec. 171).

Under Article 16, Sec. 372 of the Tax Law, dealing with personal incomes, the Commission has been delegated to "administer and enforce the tax herein im-

posed" and by section 373, subd. 1, it is empowered to revise any return of a taxpayer, if incorrect, and to assess the taxes, penalties and interest due the State, and by subd. 2, it has power to examine the books and records of such taxpayer and to take testimony.

Section 379 of the Tax Law gives discretionary power to the State Tax Commission, in certain cases, to waive or reduce any of the additional taxes, penalties or interest, or to compromise the same.

There thus was created a body which has the technical knowledge to pass upon all questions of fact, with reference to the tax due from a taxpayer and to which has been given discretion in exercising its functions in such matters.

For that reason, it has been held that a taxpayer must first exhaust his remedy before such commission, before he will be heard to assert the invalidity of an assessment.

Gorham Mfg. Co. v. State Tax Commission, 266 U. S. 265.

It is a general rule that where a body has been created by Congress or Legislature, which has the requisite facilities and experience to pass upon administrative matters, resort must first be had to such body before relief can be obtained in the courts to set aside the findings of such body.

This rule has found its illustration in cases arising under the Interstate Commerce Acts.

In these cases it has been uniformly held that as to matters within the jurisdiction of said commission, the aggrieved party must first seek relief from said commission before invoking the jurisdiction of the courts.

Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426;

*Baltimore & Ohio R. R. Co. v. U. S. ex rel.,
 Pitcairn Coal Co.*, 215 U. S. 48;
Proctor & Gamble v. U. S., 225 U. S. 282;
The Minnesota Rate Cases, 230 U. S. 352;
*Great Northern Ry. Co. v. Merchant's Elevator
 Co.*, 259 U. S. 285, 291.

The same principle has been applied in the construction of the Communications Act of 1934.

Rochester Telephone Corp v. U. S., 307 U. S. 125;

Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134.

It has also been followed in cases arising under the National Labor Relations Act.

Meyers v. Bethlehem Shipbuilding Corp., 303 U. S. 1;

Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 197.

The rule has not been limited to civil litigation, but has been extended to a criminal prosecution under the Interstate Commerce Act.

U. S. v. Pacific & Arctic Co., 228 U. S. 87.

In that case this Court held that as the purpose of the Interstate Commerce Act was to establish a tribunal to determine the relation of communities, shippers and carriers, and their respective rights and obligations dependent upon the act, the conduct of carriers is not subject to judicial review in criminal or civil cases based on alleged violations of the act until submitted to and passed on by the Commission.

This case was cited with approval in

The Minnesota Rate Case, 230 U. S. 352, 420 (*supra*).

As the State Tax Commission has, as we have seen, been invested with full power to pass upon complicated questions of fact, relating to income taxes due to the State of New York, and to use its discretion in assessing penalties, it follows from the above authorities, that before a criminal prosecution can be instituted, said State Tax Commission must first ascertain whether a tax, which is due, has not been paid.

This conclusion is fortified by the specific language of the Tax Law.

At the very end of Section 376 of the Tax Law, in pursuance of Subdivision 4 of which this prosecution has been brought, is this provision, above quoted:

"The certificate of the tax commission to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied as required by or under the provisions of this article, shall be *prima facie* evidence, that such tax has not been paid, that such return has not been filed, or that such information has not been supplied."

This language is similar in effect to that employed in Section 16 par. (2) of the Interstate Commerce Act, Title 49 U. S. C. A., in which in reference to suits for the payment of money under orders of the Interstate Commerce Commission, it is provided as follows:

"Such suit in the district court of the United States shall proceed in all respects like any other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be *prima facie* evidence of the facts therein stated."

Such language imports the requirement that has been laid down by the authorities, that the jurisdiction of the Interstate Commerce Commission must first be exhausted before the courts can be called into action.

A similar result should follow from the similar language of the Tax Law.

Such language coming at the end of Section 376 relates to everything preceding it in said section, namely, the criminal penalties imposed by subdivision 4. Such sentence is not meaningless; but it was inserted for a purpose. The purpose is that the State Tax Commission must first certify, find or determine that a tax has not been paid, which would constitute *prima facie* evidence of the same. The certificate to such effect presupposes an examination, investigation, hearing, finding and determination by it.

If the contention of the petitioner is not found valid, then any District Attorney could commence a criminal prosecution without having an administrative body, such as the State Tax Commission, pass upon the facts and thus encroach and interfere with the duties, powers and prerogatives of an administrative agency.

Without a hearing before the State Tax Commission prior to the institution of a criminal prosecution, as provided for in the Tax Law, due process has been denied to the petitioner under the Fourteenth Amendment.

Morgan v. U. S., 304 U. S. 1, 14, 15;
Shields v. Utah Idaho R. Co., 305 U. S. 177.

CONCLUSION

The petition for a writ of certiorari should be granted.

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